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No. 08-961

In The Supreme Court of the United States

DETECTIVE SHERRY MCKINNEY AND
DETECTIVE MAURICE MARTIN,
Petitioners,

v.

JUSTIN PARSONS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

INTRODUCTION

This Petition is being made fully mindful of the restrictions and requirements of Sup. Ct. R. 44(2). This Motion is not presented for the purpose of improperly creating delay. The proceedings below have not been stayed and post-remand proceedings progress in the trial court.

The underlying Petition and this Motion have both been brought exclusively in the spirit of Sup. Ct. R. 10. It is contemplated that the post-remand proceedings before the trial court may address a great many of the concerns and problems affecting the Petitioners themselves. However, they will not address the ramifications of the published Sixth Circuit Opinion provoking the original Petition for Certiorari.

THE SIXTH CIRCUIT'S OPINION, AS APPLIED, ELIMINATES QUALIFIED IMMUNITY IN THE ARREST CONTEXT

Merely for purposes of introducing the concern and not for the purpose of re-presenting argument, the primary concern is that the Sixth Circuit Opinion provides binding authority for the proposition that Officers are no longer entitled to qualified immunity in the context of arresting individuals. In short, if it is found after the fact that there was no probable cause sustaining an arrest, then the Officers are immediately deprived of any qualified immunity.

For example, in *Hicks v. Hodge*, No. 1:07-cv-483, ___ F. Supp 2d ___, 2008 WL 4425938 (S.D. Ohio Sept. 25, 2008), a trial court in the Southern District of Ohio relied upon the *Parsons* case to conclude that without probable cause there was no qualified immunity. The *Hicks* Court stated:

> A reasonable jury could also conclude that CPO Hodge lacked probable cause to arrest Hicks. *Parsons*, 533 F. 3d at 501 (stating that the existence of probable cause was a jury question). **CBO Hodge would not be entitled to qualified immunity in such circumstances. *Id.* at 504 (finding that the right not to be arrested absent probable cause was clearly established by at least 2004)**. Accordingly, summary judgment is denied to CBO Hodge on the Fourth Amendment claim.

See *Hicks* slip opinion p. 5 (emphasis added).

The Court is asked to note that there is no discussion over whether the Officers were reasonably mistaken, i.e. based upon the information they knew at the time. There is certainly no discussion regarding the burden the plaintiffs in that case had to establish that the officers were not entitled to qualified immunity. What the Sixth Circuit failed to do in *Parsons* was consider whether or not the Officers were reasonably mistaken in concluding they had probable cause. There was no discussion of this in the *Hicks* case.

Petitioners do not challenge the notion that the right to be free of arrest in the absence of probable cause exists. What Petitioners assert to this Supreme

Court is that their determination that sufficient probable cause existed is to be evaluated by a court of law in a 42 U.S.C. §1983 case under a qualified immunity analysis. Petitioners assert to this Court that a critical component of that analysis includes consideration of whether their ultimate conclusion was objectively reasonable. The Sixth Circuit did not do that. Now another court has refrained from doing that. They are simply concluding that officers are not entitled to qualified immunity if, after the fact, it is determined that probable cause to arrest did not exist.

Additionally, a municipal law treatise, McQuillin Municipal Law Report has issued an article in its August 2008 edition identifying the *Parsons* Sixth Circuit case as standing for the proposition that where there is no probable cause, there is no qualified immunity. See *No Probable Cause, No Qualified Immunity*, 26 No. 8 McQuillin Mun. Law Rep. 3 (Aug. 2008). The article specifically cited *Parsons* for the proposition that when it is established that arresting officers lacked probable cause, they are not entitled to qualified immunity protections.

QUALIFIED IMMUNITY DOES NOT EXIST WITHOUT CONSIDERATION OF WHETHER OFFICERS ARE REASONABLY MISTAKEN

This Court's recent decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), emphasizes with great clarity the importance of qualified immunity. 129 S. Ct. at 815. As illustrated in *Saucier v. Katz*, 533 U.S. 194, the qualified immunity considerations are similar but profoundly distinct from the underlying civil rights considerations. 533 U.S. at 204-205. An after the fact determination that an arrest lacked probable cause

should not serve to eliminate qualified immunity outright. Instead, it should serve to give rise to careful analysis under particularized facts as to whether or not the Officers were reasonably mistaken in concluding they had sufficient probable cause. Without that last consideration, as a practical matter, as applied, there will be no qualified immunity protections for law enforcement officers within the Sixth Circuit assessing whether or not to arrest individuals.

PETITIONERS ARE NOT CRYING WOLF

All too often, dramatic arguments regarding the flood gates of litigation fall on deaf ears, primarily due to the perception that the concern is raised more for advocacy and drama rather than as a genuine warning. Petitioners here hope to have more standing then the boy who cried wolf. Indeed, the Petitioners in this case may be able to extricate themselves from the qualified immunity problem created by the Sixth Circuit through post-remand proceedings presently pending in the trial court.

However, as the above case and article illustrate, the *Parsons* decision is a boulder positioned at the top of the mountain, ready to roll and start an avalanche of change. The question for this Supreme Court is whether it is jurisprudentially appropriate to address this question now or alternatively, to inevitably address it later. The Sixth Circuit decision has been utilized in at least one other trial court to deny officers qualified immunity. It has been recognized by at least one scholar as a basis to assert that there is no need to analyze whether officers are reasonably mistaken in concluding they had probable cause as the mere

absence of probable cause, from a 20/20 hindsight perspective, eliminates qualified immunity outright. A single case and a single article do not amount to an avalanche. This Supreme Court has the opportunity to prevent one.

CONCLUSION AND RELIEF REQUESTED

Inasmuch as the Petition has been denied, and further, the post-remand proceedings continue in the trial court, if this court is disinclined to grant the Petition for Certiorari outright for full briefing, at the very least, it is requested that the Court do so to issue an Order striking or reversing the *Parsons* decision and remanding the same to the trial court without the need for any further proceedings before this Supreme Court.

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The foregoing is restricted to the grounds specified in 44.2 Sup. Ct. R. and it is presented in good faith and not for delay.

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